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No. 84-557

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MANUEL AGROMAYOR,

Petitioner,

v.

SEVERO COLBERG,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Was the Puerto Rico Speaker's refusal to approve the hiring of a press official for the minority members of the House, who would have had a meaningful input into the legislative process, a legislative act, absolutely immune from suit under 42 U.S.C. sec. 1983.

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Respondents respectfully request this Court to deny the petition for certiorari in the exericse of its discretionary jurisdiction.

STATEMENT OF THE CASE

Respondent Severo Colberg (hereafter "Colberg"), Speaker of the House of Representatives of the Commonwealth of Puerto Rico, is charged by Rule VII of the Rules of the House (Pet. 31a), approved by that body under powers delegated by Article III, section 9 of the Constitution of Puerto Rico,[1] with

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[1] "Each house . . . shall adopt rules for its own proceedings appropriate to legislative bodies."

the responsibility of making all employment decisions for the House. Acting under these powers, he refused to hire petitioner Manual Agromayor (hereafter "Agromayor") as a press officer and advisor to the minority members of the House. The complaint, whose factual allegations must be accepted in the procedural posture of this case, alleges that Colberg's action was motivated by a newspaper article written by Agromayor and by the latter's Argentinian origin.

Agromayor brought an action under 42 U.S.C. § 1983 against Colberg in the United States District Court for the District of Puerto Rico. Colberg filed a motion to dismiss which, *inter alia,* justified dismissal on the ground of the common law doctrine of absolute legislative immunity. The District Court overruled this defense under the theory that Colberg's action was peripheral or tangential to the legislative core, unprotected by legislative immunity.

On appeal, a unanimous panel of the First Circuit (Aldrich, S.J., Bownes and Breyer, JJ.) reversed. In an opinion by Senior Judge Aldrich, the First Circuit held that Agromayor's proposed duties would provide him "enough opportunity for 'meaningful input' into the legislative process such that the employment decision should be immunized." (Pet. 19a-20a).

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Question Left Open In *Davis v. Passman* Should Not Be Decided In A Suit To Which No Federal Legislator Is A Party.

We must agree with petitioner that the question presented is substantially similar to that left open by this Court in *Davis* v. *Passman*, 442 U.S. 228, 235 n.11 (1979) (hereafter "the *Passman* issue"). However, that fact, standing alone, does not necessarily require its adjudication in this case. On the contrary, the facts and posture of this case counsel against its selection by the Court as the vehicle for the resolution of the *Passman* issue.

This Court has closely followed its holdings under the Speech or Debate Clause of the Federal Constitution, Art. I, sec. 6, in its decisions expounding the common law absolute legislative immunity of state legislators. See *Tenney* v. *Brandhove*, 341 U.S. 367, 372-379 (1951); *Lake Country States* v. *Tahoe Planning Agency*, 440 U.S. 391, 403-405 (1979); *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 731-734 (1980). As pertains to federal *civil* suits against state legislators, this Court has identified no difference in practice or in theory in the scope of the immunity accorded them vis-à-vis that of their federal counterparts:

> "Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, *United States* v. *Gillock*, 445 U.S. 360 (1980), we generally have equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution." *Supreme Court of Virginia* v. *Consumers Union*, 446 at 733.

The fact that the immunity from civil suit of state legislators may mirror that of Congressmen, however, does not mean that this Court should render a path-breaking decision in the realm of legislative immunity in a suit concerning the former and not the latter. This Court has never done this before. *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), followed *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880), and *McGrain* v. *Daugherty*, 273 U.S. 135 (1927), not vice versa. By the same token, *Supreme Court of Virginia, supra*, followed *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975). And this is as it should be. From the federal standpoint, it is the immunity of Congressmen which holds paramount importance. The Speech or Debate Clause should be interpreted with an eye toward protecting the day-to-day functions of Congressmen; that is to say, the particular functional characteristics of Congress must be studiously analyzed first. Only after this is done and the scope of the Clause expounded, may such a holding be transported to the state level, if applicable. To follow the opposite route could imperil the effectiveness of the Clause and its protection of Congressional functions.

As petitioner recognizes (Pet. 8 n.*), pending before this Court is a petition for certiorari involving a Congressman's decision to fire a Congressional employee. *Jones* v. *Walker*, No. 84-529, filed October 2, 1984. This fact, however, does not mean, as petitioner seems to imply, that the cases present issues so closely connected as to require consolidation or joinder.

The *Jones* case does not present the precise issue left open in *Passman*. It involves the firing of the

manager of the House's restaurants. Unlike *Passman*, and also unlike the case at bar, *Jones* does not involve a legislative employee with meaningful input into the legislative process.[2] It would be difficult to imagine how Ms. Jones would ever be protected derivatively herself by legislative immunity. It is readily apparent that Ms. Davis and petitioner Agromayor would be so protected in many instances. See *Gravel* v. *United States*, 408 U.S. 606, 616 (1972); *Doe* v. *McMillan*, 412 U.S. 306, 324 (1973); *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 507 (1975).

II. There Is At Present No Conflict Between The Courts Of Appeals Which Necessitates The Intervention Of This Court At This Time.

Petitioner claims that the decision below resolved the *Passman* issue in a way which conflicts with the decisions of the Fifth (*Davis* v. *Passman*, 544 F.2d 863 (1977), *rev'd en banc on other grounds*, 571 F.2d 793 (1978), *rev'd*, 442 U.S. 228 (1979)) and District of Columbia (*Walker* v. *Jones*, *supra*) Circuits. We disagree.

The Fifth Circuit panel's divided decision in *Passman* should no longer be considered of precedential value in that Circuit after its reversal *en banc*, albeit on other grounds. Only one of the judges reached the *Passman* issue in the *en banc* decision. See 571 F.2d at 802 (Jones, J.). Moreover, the panel deci-

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[2] The District of Columbia Circuit expressly recognized this and also expressly reserved the *Passman* issue for another day. *Walker* v. *Jones*, 733 F.2d 923, 930 (D.C. Cir. 1984).

sion was rendered before this Court considered the case and without the benefit of the views of three Justices. That leaves only the District of Columbia Circuit to contend with.

As previously discussed, the District of Columbia Circuit's *Jones* decision is readily distinguishable from the First Circuit's *Agromayor* decision as pertains to the nature and functions of the office involved. As a matter of fact, both Circuits view the nature and functions of the office denied or vacated as decisive for purposes of the legislative immunity inquiry. Compare Pet. 13a-20a with *Walker* v. *Jones*, 733 F.2d at 930-932.[3] Their analytical framework is identical, as shown by Judge Aldrich's agreement with the D.C. Circuit both as to its analysis and result. (Pet. 18a).

Thus, instead of a conflict between the Circuits, careful analysis of the decisions shows conclusively that there is wholehearted agreement between the only two Circuits whose consideration of the *Passman* issue has not been mooted by subsequent events.

This Court's intervention at this time is not warranted. The views of other Circuits regarding the *Passman* issue should be awaited before its definitive resolution by this Court.

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[3] Moreover, the only Fifth Circuit judge who addressed the legislative immunity issue in the *en banc Passman* decision agreed that this is the relevant analysis. See 571 F.2d at 802 (Jones, J.).

III. The First Circuit's Approach To The *Passman* Issue Is Correct And Petitioner Does Not Challenge This.

Last, but not least, we submit that the decision below is correct. It held that the hiring of an employee whose duties will meaningfully affect the Legislature's deliberative and communicative processes is of direct legislative importance such that the employment decision should be immunized. (Pet. 11a *et seq.*).

To that effect, petitioner does not argue before this Court that in the job he sought in the Commonwealth's House he was not to have "enough opportunity for 'meaningful input' into the legislative process." (Pet. 19a-20a). Instead, to support his conclusion that the federal courts are entitled to step in, petitioner relies on the fact that the Puerto Rico House has delegated the final hiring decision to its Speaker. According to petitioner, the hiring decision is no longer immunized if not taken personally by the legislator for whom the hired employee is going to work. In other words, petitioner's only argument is that notwithstanding whatever input the prospective employee might hav on the legislative process, the decision as to his recruitment is not immunized simply because the Puerto Rico House decided to entrust its Speaker and not the individual Representative with the final hiring decision. (Pet. 15 *et seq.*).

The Court of Appeals quite properly disposed of petitioner's thesis when it stated that the hiring scheme of the Puerto Rico House "is a legislative matter, not our concern." (Pet. 20a). The operative, unchallenged and controlling fact in this case is that the job petitioner sought in the Puerto Rico House

had a meaningful input into its legislative process. Accordingly, the Court of Appeals properly ended the judicially directed inquiry into the Speaker's decision, so as not to unduly impinge on his legislative prerogatives. See *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 511 (1975).

To summarize, this is not a case that merely rests on the issue left open in *Passman.* Petitioner does not challenge the way the First Circuit has approached that query, *i.e.*, that the decision to hire or fire legislative employees who have a meaningful input into the legislative process, is immune. Simply, petitioner disagrees with the way doctrine has been applied by the Court of Appeals to the particular hiring scheme adopted by the Puerto Rico representatives. He does not even inquire whether such scheme is or is not disseminated through the state legislatures before asking this Court to entertain his case.

As before the Court of Appeals, petitioner has failed to explain here why the representatives' decision to entrust their Speaker with the final hiring decision should make him less immune than his colleagues.

CONCLUSION

The petition for certiorari should be denied in the exercise of this Court's discretionary jurisdiction.

Respectfully submitted, this 2nd day of November, 1984.

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